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No. 91-1876

In The

Supreme Court of the United States

October Term, 1992

SAM F. LONG AND ELMER J. CANTRELL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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After a jury verdict of guilty on three (3) counts and not guilty on seven (7) counts, the district court for the Western District of Missouri granted a post-verdict judgment of acquittal on the ground that there was insufficient evidence to convict. The district court also held that a new trial was warranted, but moot in light of the acquittal, because it failed to instruct the jury about single or multiple conspiracies. Following the Government's direct appeal, the Court of Appeals reversed and reinstated the jury verdict, holding that there was sufficient evidence to convict and that a new trial was not warranted.

The Government argues that Petitioners' contentions are not ripe for review by this Court because the Court of

Appeals' reinstatement of the jury verdict puts Petitioners in the same position as when they were originally convicted. Thus, the Government's argument goes, Petitioners cannot directly appeal that final judgment until after sentencing by the district court. At such time, the Government contends Petitioners will be able to raise their current contentions. Further, in a footnote, the Government refers to this Petition as interlocutory and thus did not respond on the merits. The Government cites no case law for any of its contentions.

While the Government argues that this case is interlocutory, Petitioners disagree. Petitioners merely seek review of the Court of Appeals' decision overruling the district court's entry of a judgment of acquittal. Clearly, entry of a judgment of acquittal constitutes a final judgment. *United States v. Martinez*, 763 F.2d 1297, 1311 (11th Cir. 1985). Thus, the Petition is appropriate at this stage.

If considered interlocutory, the Court of Appeals' reinstatement of the jury verdict can be appealed only under certain circumstances which do not exist in this case.[1] If review on this Petition for Writ of Certiorari is not granted, Petitioners are concerned that the Government is likely to later assert collateral estoppel to prevent any appeal to the Eighth Circuit and, if necessary, any Petition for Writ of Certiorari to this court, following their sentencing. The Petitioners expect that the Government would assert collateral estoppel on the basis that

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[1] For example, the collateral order exception is not met here because sufficiency of the evidence is not an issue completely separate from the merits of the action. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-7 (1949); *Sedlock by Sedlock v. Bic Corp.*, 926 F.2d 757, 758 (8th Cir. 1991).

the Court of Appeals has already ruled there was sufficient evidence to convict and there was no error in the district court's failure to instruct on one versus two conspiracies.

The elements of collateral estoppel are:

(1) The issue sought to be precluded must be the same as that involved in the prior action;

(2) The issue must have been litigated in the prior action;

(3) The issue must have been determined by a valid and final judgment; and

(4) The determination must have been essential to the prior judgment.

In re Miera, 926 F.2d 741, 743 (8th Cir. 1991). The Petitioners expect that the Government would attempt to demonstrate that the elements of collateral estoppel would be met as a result of the existing decision by the Court of Appeals that has already addressed the sufficiency of the evidence and conspiracy instruction issues. Thus, Petitioners believe the Government is setting up a "catch-22" situation by arguing that this is an interlocutory petition at this stage and positioning to argue the finality of the existing Court of Appeals' decision and collateral estoppel later. If this Court accepts the Government's argument, Petitioners will be in a no-win situation.

In response to this predicament, this Court should overrule the Government's argument that the Petition is interlocutory and grant review. Alternatively, this Court should make clear that the doctrine of collateral estoppel

should not be applied, if review is not granted by this Court and, if the Government later asserts that doctrine.

In *Pinkney v. Keane*, 920 F.2d 1090, 1096 (2d Cir. 1990), the Second Circuit noted that "failure to appeal an adverse judgment negates the preclusive effect of that judgment only when review was unobtainable 'as a matter of law.' " In other words, collateral estoppel does not preclude relitigation of an issue when the prior judgment was unreviewable as a matter of law. In footnote nine, the court in *Pinkney* further noted that unreviewable as a matter of law includes a situation in which " 'the law does not allow review of the particular category of judgments.' " *Pinkney*, 920 F.2d at 1096 (quoting *Restatement (Second) of Judgments* § 28(1) cmt. a (1992)).

Interlocutory judgments are in a category of judgments where review is not granted as a matter of law. Thus, in the present case, if this Court rejects the Petition because it is interlocutory, it should also determine that review is unobtainable as a matter of law. Accordingly, should the Court deny the Petition, collateral estoppel should not be applied to the present case to preclude litigation of the sufficiency of the evidence and conspiracy instruction issues on direct appeal to the Eighth Circuit or, if necessary, on any subsequent Petition for Writ of Certiorari after sentencing.

Fairness should also be a consideration in determining applicability of collateral estoppel. *See In re Miera*, 926 F.2d 741, 743 (8th Cir. 1991) (collateral estoppel is only applied against those with full and *fair* opportunity to litigate in a prior adjudication); *Frye v. United Steelworkers of America*, 767 F.2d 1216, 1221 (7th Cir. 1985), *cert. denied*,

474 U.S. 1007 (1985) ("considerations of fairness can make application of collateral estoppel inappropriate for a number of reasons"). Petitioners contend that unfairness would result if review of the sufficiency of the evidence and new trial issues is precluded altogether.

Petitioners contend that this Court should overrule the Government's argument that the Petition is interlocutory. Alternatively, should this Court determine this Petition is interlocutory, it should deny the Petition on that basis and so state. Petitioners respectfully request that this Court note that collateral estoppel does not preclude raising these issues on appeal and/or a later petition for writ of certiorari after sentencing, if it denies this Petition for Writ of Certiorari.

WHEREFORE, for the foregoing reasons and those stated in their Petition, Petitioners respectfully pray this Court grant their Petition for Writ of Certiorari or, in the alternative, indicate the reason for denial of certiorari and state that Petitioners are not collaterally estopped from raising these issues on appeal after sentencing, and for any other relief this Court deems just and proper.

Respectfully submitted,

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